Case C-854/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

22 November 2019

Referring court:

Verwaltungsgericht Köln (Germany)

Date of the decision to refer:

18 November 2019

Applicant:

Vodafone GmbH

Defendant:

Federal Republic of Germany

Subject matter of the main proceedings

Telecommunications, mobile communications tariffs, data roaming, different arrangements for use domestically and in other EU countries

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. a) In a case where a mobile communications tariff which customers can use abroad and which provides a monthly inclusive data volume for mobile data traffic, after the consumption of which the transmission speed is reduced, can be extended by a free tariff option on the basis of which certain services of partner companies of the telecommunications company can be used domestically without the data volume consumed through the use of those services being offset against the monthly inclusive data volume of the mobile communications tariff, whereas

abroad the data volume in question is offset against the monthly inclusive data volume of the mobile communications tariff, is the concept of the regulated data roaming service within the meaning of Article 6a in conjunction with Article 2(2)(m) of Regulation No 531/2012 to be understood as meaning that the mobile communications tariff and the tariff option are to be jointly qualified as a single regulated data roaming service with the result that a non-offsetting of the data volume consumed through the use of the services of partner companies against the monthly inclusive data volume is impermissible only domestically?

b) If Question 1 a) is to be answered in the affirmative: In a situation such as that in question in the present proceedings, is Article 6a of Regulation No 531/2012 to be interpreted as meaning that the offsetting of the data volume consumed through the use of the services of partner companies against the monthly inclusive data volume of the mobile communications tariff abroad is to be qualified as the charging of an additional fee?

c) If Question 1 a) and Question 1 b) are to be answered in the affirmative: Does this also apply if, in a situation such as that in question in the present proceedings, a fee is demanded for the tariff option?

2. a) If Question 1 a) is to be answered in the affirmative: In a situation such as that in question in the present proceedings, is the first subparagraph of Article 6b(1) of Regulation No 531/2012 to be interpreted as meaning that a fair use policy for the use of regulated roaming services at retail level can also be provided for the tariff option as such?

b) If Question 1 a) is to be answered in the affirmative and Question 2 a) is to be answered in the negative: In a situation such as that in question in the present proceedings, is the first subparagraph of Article 6b(1) of Regulation No 531/2012 to be understood as meaning that a common fair use policy for the use of regulated roaming services at retail level can be provided both for the mobile communications tariff and the tariff option with the result that the overall domestic retail price of the mobile communications tariff and/or the sum of the overall domestic retail prices of the mobile communications tariff and the tariff option is to form the basis of the calculation of the data volume to be provided within the scope of a common fair use policy?

c) If Question 1 a) is to be answered in the affirmative and Question 2 a) and Question 2 b) are to be answered in the negative: In a situation such as that in question in the present proceedings, is the first subparagraph of Article 6b(1) of Regulation No 531/2012 in conjunction with the first subparagraph of Article 4(2) of Implementing Regulation No 2016/2286 applicable by analogy in such a way that a fair use policy can be provided for the tariff option as such?

3. a) If Question 2 a) or c) is to be answered in the affirmative: Is the concept of the open data bundle for the purpose of the first subparagraph of Article 6b(1) of Regulation No 531/2012 in conjunction with the first

subparagraph of Article 4(2) and Article 2(2)(c) of Implementing Regulation No 2016/2286 to be interpreted as meaning that a tariff option for which a fee is demanded is to be qualified in itself as an open data bundle?

b) If Question 3 a) is to be answered in the affirmative: In a situation such as that in question in the present proceedings, does this also apply if no fee is demanded for the tariff option?

4. If Question 2 a) or c) is to be answered in the affirmative and Question 3 a) or b) is to be answered in the negative: In a situation such as that in question in the present proceedings, is the first subparagraph of Article 6b(1) of Regulation No 531/2012 in conjunction with the first subparagraph of Article 4(2) of Implementing Regulation No 2016/2286 to be interpreted as meaning that the overall domestic retail price of the mobile communications tariff is also to be used for calculating the volume which must be provided to roaming customers within the scope of a fair use policy based in isolation on the tariff option as such?

Relevant provisions of EU law

Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (OJ 2012 L 172, p. 10), specifically Article 6a and the first subparagraph of Article 6b(1)

Commission Implementing Regulation (EU) 2016/2286 of 15 December 2016 laying down detailed rules on the application of fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment (OJ 2016 L 344, p. 46), specifically Article 2(2)(c) and the first subparagraph of Article 4(2)

Relevant provisions of national law

Telekommunikationsgesetz (Law on Telecommunications) of 22 June 2004 (BGBl. [Federal Law Gazette] I p. 1190), specifically Paragraph 126

Brief summary of the facts and procedure

1 The applicant is a telecommunications company which offers its customers *inter alia* mobile communications services at different tariffs. Since 26 October 2017, customers can add what are known as Vodafone passes (‘Chat Pass’, ‘Social Pass’, ‘Music Pass’ and ‘Video Pass’) to the ‘Red’ and ‘Young’ tariffs that are offered by the applicant and that customers can use abroad; the tariffs provide a different monthly inclusive data volume in each case for mobile data traffic, after the consumption of which the transmission speed is reduced; however, the

applicant does not offer the Vodafone passes without an underlying mobile communications tariff. The first Vodafone pass is already included in the mobile communications tariffs in question. Further Vodafone passes can be added in return for an additional fee. The 'Video Pass' is only offered in the 'Red S-L' and 'Young M-XL' tariffs.

2 A Vodafone pass makes it possible to use the services of the applicant's partner companies, with the particular feature that the data volume consumed through the use of those services is not offset against the inclusive data volume of the underlying mobile communications tariffs. However, the reduction in transmission speed provided after consumption of the inclusive data volume also covers the use of the partner companies' services. The Vodafone passes are only valid domestically. Abroad, on the other hand, the data volume consumed for the use of the services of partner companies is offset against the inclusive data volume of the mobile communications tariff. Furthermore, the applicant reserves the right to also offer the Vodafone passes in other European countries in the future. In this event, a fair use policy with a maximum possible use of the Vodafone passes in other European countries of 5 GB of data volume per pass per month is to apply.

3 On 15 June 2018, the Bundesnetzagentur (German Federal Network Agency) issued the decision that is the subject matter of the proceedings. In that decision, it found that, due to the offsetting of the use of the respectively covered apps abroad against the respectively included data volume, the Vodafone passes are in breach of Article 6a in conjunction with Article 2(2)(r) of Regulation No 531/2012, and prohibited the applicant from making further use of the corresponding tariffs and clauses. It also found that the fair use limit of 5 GB is in breach of Article 6b(1) of Regulation No 531/2012, in so far as this volume falls below the volume calculated under that provision, and prohibited the applicant from using the corresponding tariffs and clauses.

4 The objection filed by the applicant against that decision was dismissed on 23 November 2018.

Principal arguments of the parties in the main proceedings

5 The applicant claims that the Vodafone passes are an independent data communications service and not part of a single regulated data roaming service within the meaning of Article 6a of Regulation No 531/2012. This can be seen from the wording of Article 2(2)(m) of Regulation No 531/2012, the systematic relationship between Article 2(2)(m) and Article 6a of Regulation No 531/2012 and the spirit and purpose of the provisions in question. Moreover, the Vodafone passes are add-ons within the meaning of the Guidelines of the Body of European Regulators for Electronic Communications (BEREC). Furthermore, the Vodafone passes are to be qualified as open data bundles within the meaning of the first subparagraph of Article 4(2) of Implementing Regulation 2016/2286, as they provide an unlimited data volume. A fixed fee within the meaning of

Article 2(2)(c) of Implementing Regulation 2016/2286 is also demanded. In any event, the first subparagraph of Article 4(2) of Implementing Regulation 2016/2286 is to be applied by analogy in the case of the Vodafone passes, as add-ons within the meaning of the BEREC Guidelines are involved.

6 The defendant disputes the applicant's arguments.

Succinct presentation of the reasons for the reference

7 The legal situation at the time of the last official decision, that is to say on 23 November 2018, is decisive.

First question referred

8 In the opinion of the referring court, there are substantial grounds for thinking that the applicant's tariffs are in breach of Article 6a of Regulation No 531/2012.

9 The applicant's mobile communications tariffs to which Vodafone passes can be added are undoubtedly regulated data roaming services within the meaning of Article 6a of Regulation No 531/2012 in conjunction with Article 2(2)(m) of Regulation No 531/2012, since these mobile communications tariffs enable within the meaning of Article 2(2)(m) of Regulation No 531/2012 roaming customers to use packet switched data communication while they are connected to a visited network.

10 By contrast, the Vodafone passes offered by the applicant merely have the effect that the data volume consumed through the use of the services of partner companies is not included in the calculation of the inclusive data volume agreed in the underlying mobile communications tariff. This is because the Vodafone passes make it possible to use selected services of partner companies without consuming the included tariff data volume.

11 This non-offsetting of the consumed data volume against the inclusive data volume agreed in the underlying mobile communications tariff is an obstacle to the applicant's assumption that the Vodafone passes are exclusively domestic data communications services through which an additional data volume is provided. That stated above shows them to instead be part of the underlying mobile communications tariff. Accordingly, as part of a regulated data roaming service, the Vodafone passes also fall within the scope of application of Article 6a of Regulation No 531/2012. It is irrelevant here that, with the exception of the first Vodafone pass in the case of new contracts, the applicant demands an additional fee for Vodafone passes.

12 As, according to the case-law of the Oberverwaltungsgericht (Higher Administrative Court) for the State of North Rhine-Westphalia, it is not possible to reconcile applying the ban on retail roaming surcharges only to direct roaming surcharges with the regulatory purpose of Article 6a of Regulation No 531/2012,

the applicant, with the current configuration of its mobile communications tariffs, is also in breach of Article 6a of Regulation No 531/2012. Based on the assumption that, in the scope of application of Article 6a of Regulation No 531/2012, the Vodafone passes are to be regarded as part of the underlying mobile communications tariff, the offsetting of the data volume for the use of the services of partner companies in other (European) countries against the data volume included in the underlying mobile communications tariff leads to a change in the fee charging mechanism that is impermissible under Article 6a of Regulation No 531/2012. This is because although roaming customers do not directly pay a higher fee for use in other (European) countries, they receive a reduced service for the same fee. On the other hand, the applicant is unconvincing in its argument that the Vodafone passes are advantageous precisely because there is no offsetting of the data volume consumed for the use of the services of partner companies against the inclusive data volume of the mobile communications tariffs domestically and therefore a greater inclusive data volume is available abroad.

13 However, the referring court does not consider the view that the applicant is in breach of Article 6a of Regulation No 531/2012 to be so obviously correct that, according to the 'acte-clair doctrine', it is possible to consider dispensing with a referral to the Court of Justice of the European Union.

The second to fourth questions referred

14 The referring court assumes that the applicant is in breach of Article 6b of Regulation No 531/2012 in conjunction with the first subparagraph of Article 4(2) of Implementing Regulation 2016/2286.

15 A permissible fair use policy within the meaning of the first subparagraph of Article 6b(1) of Regulation No 531/2012 cannot relate in isolation to the Vodafone passes offered by the applicant, since the Vodafone passes are — as set out above — to be regarded as part of the underlying mobile communications tariff and therefore of a regulated (data) roaming service within the meaning of the first subparagraph of Article 6b(1) of Regulation No 531/2012. For this reason, a fair use policy cannot in any event relate to the Vodafone passes as such. The first subparagraph of Article 6b(1) of Regulation No 531/2012 expressly only allows a fair use policy for the use of regulated (data) roaming services, but it does not do so for individual components of such services. For this reason alone, the applicant is in breach of the first subparagraph of Article 6b(1) of Regulation No 531/2012 by providing a fair use policy with a maximum possible use of the Vodafone passes in other (European) countries of 5 GB of data volume per Vodafone pass per month in the event that the Vodafone passes are also offered in other (European) countries in the future.

16 That outcome is not altered by the fact that, according to the BEREC Guidelines, in corresponding application of the first subparagraph of Article 4(2) of Implementing Regulation 2016/2286, what is known as an add-on should be able to be restricted by a fair use policy since, on the basis of the case-law of the

Higher Administrative Court for the State of North Rhine-Westphalia, an add-on only exists when additional data volume is added in return for a fee, after the initially available inclusive data volume has been consumed. This does not apply to the Vodafone passes offered by the applicant.

17 It is therefore irrelevant in the present case whether the applicant is (also) in breach of the first subparagraph of Article 4(2) of Implementing Regulation 2016/2286 as a result of its fair use policy since, considering that a permissible fair use policy within the meaning of the first subparagraph of Article 6b(1) of Regulation No 531/2012 cannot relate in isolation to the Vodafone passes offered by the applicant, it is irrelevant whether the applicant calculated the data volume it provided in this respect in accordance with the provisions of the first subparagraph of Article 4(2) of Implementing Regulation 2016/2286.

18 However, the referring court also does not consider a breach of the first subparagraph of Article 6b(1) of Regulation No 531/2012 to be so obvious that, according to the ‘acte-clair doctrine’, a referral to the Court of Justice of the European Union can be dispensed with.